BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9600
File: 21-260271 Reg: 16083546

SASAM NIKFARJAM,
dba Handy Liquor Store
14301 San Pablo Avenue, San Pablo, CA 94806,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: April 6, 2017
Sacramento, CA

ISSUED APRIL 24, 2017

Appearances: *Appellant:* Sasam Nikfarjam, appearing in propria persona.
Respondent: Sean Klein as counsel for the Department of Alcoholic Beverage Control.

OPINION

Sasam Nikfarjam, doing business as Handy Liquor Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending his license under article XX, section 22 of the California Constitution and Business and Profession Code sections 24200(a) and (b) because his clerk knowingly sold counterfeit goods in violation of Penal Code section 350, and because he possessed on the licensed premises an illegal gambling device in violation of Penal Code sections 330a, 330.1, and 330.4. Appellant's license was suspended for 15 days and 20 days respectively, with 15 days of the 20-day suspension conditionally stayed provided the license remain discipline-free for two years. The penalties are to be served concurrently.

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1. The decision of the Department, dated June 21, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 10, 1991. On January 7, 2016, the Department instituted a 16-count accusation against appellant alleging violations of sections 330a, 330.1, 330.4, 350, and 653w of the Penal Code. Counts 1, 3, 5, 6, 8, 10, 13, and 15 alleged that appellant, on various dates, knowingly sold or possessed for sale counterfeit goods, a violation of Penal Code section 350. Counts 2, 4, 7, 9, 11, and 14 alleged that appellant, on various dates, knowingly possessed for sale or rent DVDs that failed to clearly disclose the manufacturer, a violation of Penal Code section 653w. Counts 12 and 16 alleged that appellant possessed on the licensed premises a coin-operated video slot machine, in violation of Penal Code sections 330a, 330.1, and 330.4.

At the administrative hearing held on May 3, 2016, documentary evidence was received and testimony concerning the violations charged was presented by Agents Justin Griffin, Ashley Guizar, and Daniel Sumida of the Department of Alcoholic Beverage Control; by Christopher E. Knowles, brand protection manager for New Era Cap Company, Inc.; and by appellant's employee Sanjiv Bhatta.

Testimony established that the investigation took place over multiple dates between June and October of 2015.

Counts 1 and 2

On June 24, 2015, Agents Daniel Sumida and Ashley Guizar conducted an inspection at appellant's licensed premises. During the inspection, they found two boxes containing approximately 150 to 200 DVDs for sale. The DVDs were not all sealed in plastic wrap, the DVD covers were thinner than authentic ones, they did not have pricing logos, some DVD covers had unlabeled discs inside, and the printing on the DVD packaging appeared somewhat blurry. Based upon training they had received, Agents Sumida and Guizar believed

the DVDs were counterfeit copies. Sumida purchased three DVD films for $10 from the store clerk.

Agent Sumida later played all three DVD movies he purchased. He noted, among other things, that the movies had no credits, did not have a typical DVD menu of options, and did not have previews or other features prior to the movie itself. The movies appeared to be jostled about, showed shadows of figures moving about, and had extraneous noise, voices, and laughter. This was consistent with someone making a recording of the film as it played in a theater. Based on these factors, Sumida believed the DVDs were counterfeit.

Counts 3, 4, and 5

On June 25, 2015, Agents Sumida and Guizar made a second visit to the licensed premises. Agent Sumida informed the clerk, identified as Sanjiv Bhatta, that one of the three movies he bought the day before was bad. Bhatta said he did not usually get complaints about them, and if Sumida returned the bad disc, it could be exchanged for another movie. Agent Sumida purchased the movie "Rock of Ages" from the clerk for $4, and asked the clerk if he could obtain three other specific movies. Sumida left a note with the names of those three movies with the clerk.

Also on June 25, 2015, Agent Guizar observed some baseball cap style hats on display for sale in the store. She asked a store employee to examine some of the hats. Several hats had a New Era logo embroidered on the left side of the hat. They were priced at $7.99, when authentic New Era caps retailed for $40 to $50. As she examined a San Francisco 49ers cap, she noticed it was missing certain marking and stitches of an authentic New Era manufactured cap and, based on training she had received, she suspected it was a counterfeit product.

She told the clerk she was considering buying the hat as her brother's birthday gift. She asked the clerk if the baseball cap was fake. The clerk indicated it was fake because authentic

hats of that kind cost $40 or $50. This hat cost only $7.99. The clerk also indicated that based on his inspection of the New Era logo on the hat, it was a fake New Era hat. Agent Guizar purchased the San Francisco 49ers hat and paid $7.99.

Later, Agent Guizar contacted Christopher Knowles, a brand protection manager for the New Era Company. Upon his inspection of the hat Agent Guizar purchased, he determined it was not an authentic New Era production cap. Knowles provided a declaration regarding his findings that the hat was not an authentic New Era product.

At the hearing, Knowles testified that he is a brand protection manager for the New Era Cap Company, Inc. He works in the United States and Latin America in efforts to protect the New Era logo and work mark, both registered with the United States Patent and Trademark Office. The company possesses licenses to manufacture headwear, apparel, and accessories on behalf of numerous entities, including the National Football League and Major League Baseball. He is thoroughly familiar with how their licensed products, including baseball style caps, are designed and manufactured, including the built-in security features that distinguish them from counterfeit hats. He testified the San Francisco 49ers cap Agent Guizar purchased at the licensed premises was not an authentic New Era product. It did not contain certain labeling and manufacturing characteristics and features of an authentic New Era San Francisco 49ers cap. He testified the manufacturer's suggested retail price for an authentic 49ers cap would be approximately $34.99. Counterfeit use of their brand on inferior products tarnishes New Era's reputation and brand value.

Counts 6 and 7

On June 30, 2015, Agent Sumida returned to the licensed premises. He told appellant that he had given a clerk a list of three DVD movies he wanted to buy. The clerk was off duty. Appellant looked around and could not find Sumida's requested movies. Sumida purchased another DVD film, "Robocop," and it came in packaging with labeling that was not consistent with authentic merchandise. The actual DVD disc itself had no labeling on it at all. Sumida did not recall viewing the actual DVD movie. He suspected this DVD was also a counterfeit product.

Counts 8 and 9

On July 9, 2015, Agent Sumida made another trip to the licensed premises. He asked clerk Bhatta if the three specific movies he wanted were available. Bhatta said some new movies came in, but he was not sure if the three Sumida wanted were among them. Sumida looked amongst the available DVDs and selected the movie "Blackhat" to purchase. He told the clerk that the three movies he wanted were not there. Bhatta said they get new movies delivered every few weeks. Sumida paid for the movie and a drink. Sumida later viewed the movie he purchased. It, like the other movies he purchased from the premises, also appeared to have been recorded by someone taking a video recording of a movie as it played in a theater.

Counts 10 and 11

On September 10, 2015, Agent Sumida returned to the licensed premises and purchased another DVD movie, "The Great Gatsby," which also had the outward appearance of a counterfeit good. When he viewed this DVD, it also appeared to be a counterfeit copy.

Also on September 10, 2015, Sumida observed a slot machine in a public area of the licensed premises near the entrance. It had a payout screen indicating a schedule of what certain spin results would earn in terms of "credits." It had a paper sign posted on it stating

"For Amusement Only No Cash Value." In Agent Sumida's experience, few of these type slot machines found in licensed premises actually pay out in cash. Some will pay out a redeemable voucher. Some machines permit added free spins or plays for a winning combination until there are 20 or so credits, after which a cash out or redemption may be possible. Sumida played the machine, but never hit a winning combination.

Count 12

On September 24, 2015, Agent Justin Griffin went to the licensed premises and observed the video slot machine within appellant's store in a public area near an entrance. He deposited $2 into the machine and was given eight play credits. One of the machine's buttons was pressed to select the amount of the wager, and another to begin the spinning of electronic panels. Griffin played the machine, but did not win any of his wagers. No skill or experience was needed to play the machine. This machine paid out winning bets in added plays on the machine. The machine did not make cash payouts, or issue any kind of voucher or script redeemable for money or other goods.

Counts 13, 14, 15, and 16

On or about October 2, 2015, some hats/caps were seized by law enforcement from appellant's licensed premises, but there was insufficient evidence they bore a counterfeit New Era logo or counterfeit New Era word mark on them. There was also no evidence of any DVDs on the premises that day. Appellant confirmed the slot machine was on the premises that day, but was unplugged because he was going to return it to the original vendor.

Appellant obtained the complained-of DVDs from a local vendor. Initially, the vendor supplied only Spanish-language DVDs, but then began to add English-language DVDs. Appellant believed they were possibly used secondhand DVDs or surplus stock.

The slot machine was provided by another local vendor and was at the store for less than two months. It paid out only winning credits entitling the user to added plays on the machine. Appellant posted a sign on the machine saying "For Amusement Only No Cash Value." Appellant did not pay out any cash winnings or redeem or exchange any credits won on the machine for cash or merchandise.

The baseball caps were purchased through another local vendor that also sold health and beauty aids, lighters, medicines, and small items. Appellant was not aware of the counterfeit New Era trademark on the hats until he read the Department's accusation.

After the hearing the Department issued its decision, which found that counts 5, 12, and 16 were proven and no defense was established. Count 5 pertained to the single instance in which Agent Ashley Guizar purchased a San Francisco 49ers hat bearing a counterfeit New Era logo. Counts 12 and 16 pertained to the presence of a coin-operated video slot machine on the licensed premises. The remaining counts were dismissed. The ALJ acknowledged appellant's discipline-free licensure as mitigating evidence, and imposed a 15-day suspension for count 5 and a 20-day suspension for counts 12 and 16, to run concurrently.

Appellant filed a timely appeal contending (1) he was unaware of the New Era Company, and is uncertain how one hat with a counterfeit New Era logo entered his inventory; (2) he never intended the video gaming machine to operate as a slot machine, it never paid out cash or anything of value, and in any event was unplugged and in the process of being removed due to lack of interest; and (3) a fine in lieu of suspension would be a more appropriate penalty.

DISCUSSION

I

Appellant contends that he was not aware of a company by the name of New Era, was not familiar with its trademarked logo, and is uncertain how a single hat bearing the New Era logo found its way into his inventory. (App.Br., at p. 1.) Appellant is, in essence, arguing he had neither knowledge nor intent to violate Penal Code section 350.

The Department does not respond to this argument. (See generally Dept.Br.)

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The suspension in this case emerges from the Department's police powers, as granted by the California Constitution and by statute. Article XX, section 22 of the California Constitution provides, in relevant part, "The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals . . . ." The Business and Professions Code echoes this authority:

> The following are the grounds that constitute a basis for the suspension or revocation of licenses:
>
> (a) When the continuance of a license would be contrary to public welfare or morals. However, proceedings under this subdivision are not a limitation upon

> the department's authority to proceed under Section 22 of Article XX of the California Constitution.
>
> (b) Except as limited by Chapter 12 . . . the violation or the causing or permitting of a violation by a licensee . . . any rules of the department adopted pursuant to the provisions of the division, or any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

(Bus. & Prof. Code, § 24200(a) and (b).)

According to the courts,

> the discretion exercised by the Department under section 22 of article XX of our Constitution "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." [Citations.] Nevertheless, it is the Department, and not the Board or the courts, which must determine whether "good cause" exists for denying a license upon the ground that its issuance would be contrary to public welfare or morals. [Citations.]

(*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 7 Cal.3d 433, 436-437 [102 Cal.Rptr. 857].) The same reasoning extends to the suspension of licenses:

> Although most cases address the Department's discretionary powers in the context of the revocation, granting or denial of a license, the same deferential standard of review should and would apply to the Department's discretionary powers to determine whether there is good cause to suspend a license, since all of the powers derive from the same constitutional source.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Deleuze*) (2002) 100 Cal.App.4th 1066, 1072 [123 Cal.Rptr.2d 278] [addressing license suspension for tied-house violations in advertising].)

Case law addresses the scope of the two subdivisions of section 24200.

> The moral turpitude provision [in subdivision (b)] is absolute, permitting license termination for an offense coming within its terms regardless of its effect upon the conduct of the licensed business. (See *Mercurio v. Department of Alcoholic etc. Control*, 144 Cal.App.2d 626, 633 [301 P.2d 474].) Properly construed, the public welfare and morals clause [in subdivision (a)] permits license termination for law

> violations not involving moral turpitude but having a rational relationship with the operation of the licensed business in a manner consistent with public welfare and morals. (See, e.g., *Macfarlane v. Department of Alcoholic Beverage Control*, 51 Cal.2d 84 [330 P.2d 769]; *Cornell v. Reilly*, 127 Cal.App.2d 178 [273 P.2d 572].)

(*H.D. Wallace & Assocs., Inc.* (1969) 271 Cal.App.2d 589, 593 [76 Cal.Rptr. 749].)

A licensee may be held liable for the actions of his agents or employees:

> The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature.

(*Mantzoros v. State Bd. of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657] [declining to resolve whether licensees can be held *criminally* liable for employees' acts, but holding that they are subject to *license discipline* based on those acts].)

Grounds for suspension under count 5 of the Accusation emerged from the purported sale of a counterfeit hat in violation of Section 350 of the Penal Code. That section provides, "Any person who *willfully* manufactures, *intentionally* sells, or *knowingly* possesses for sale any counterfeit mark registered with the Secretary of State or registered on the Principal Register of the United States Patent and Trademark Office, shall, upon conviction, be punishable as follows . . . ." (Pen. Code, § 350(a), emphasis added.)

Appellant contends the violation was not willfully or knowingly done:

> We have been found guilty to Count 5, Possession of one single counterfeit New Era hat. The hat was purchased by one ABC investigator on June 25, 2015. We honestly were not aware of the existence of a company by that name nor were familiar with their trade mark logo before we were charged with the accusation. . . . We are still not sure how that one single hat found its way into our inventory.

(App.Br., at p. 1.)

As to count 5, the ALJ made the following findings of fact:

> 6. [O]n June 25, 2015, Agent Guizar observed some baseball cap style hats on display for sale in the store. (Exhibits 3A and 3B) She asked a store employee to examine some of the hats. Several hats had a New Era logo embroidered on the left side of the hat. They were priced at $7.99, when authentic New Era caps retailed for $40.00-$50.00. As she examined a San Francisco 49ers cap she noticed it was missing certain markings and stitchings of an authentic New Era manufactured cap and, based on training she received, she suspected it was a counterfeit product. (Exhibits 5-A to 5D and 6).
>
> She told the clerk she was considering buying the hat as her brother's birthday gift. She asked the clerk if the baseball cap was fake. The clerk indicated it was fake because authentic hats of that kind cost $40.00 or $50.00. This hat cost only $7.99. The clerk also indicated that based on his inspection of the New Era logo on the hat, it was a fake New Era hat. Agent Guizar purchased the San Francisco 49ers hat paying only $7.99. (Exhibit 5 and 6.)
>
> 7. Later, Agent Guizar contacted Christopher Knowles, a brand protection manager for the New Era Company. Upon his inspection of photos of the hat Agent Guizar purchased, he determined it was not an authentic New Era production cap. Knowles provided a declaration regarding his findings that the hat was not an authentic New Era product. (Exhibit 9.)
>
> 8. Christopher E. Knowles testified at the hearing that he is a brand protection manager for the New Era Cap Company, Incorporated. He works in the United States and Latin America in efforts to protect the New Era logo and word mark, both registered with the United States Patent and Trademark Office. (Exhibit 7 and 8) The company possesses licenses to manufacture headwear, apparel, and accessories on behalf of numerous entities, including the National Football League and Major League Baseball. He is thoroughly familiar with how their licensed products, including baseball style caps, are designed and manufactured, including their built-in security features that distinguish them from counterfeit hats/caps. He testified the San Francisco 49ers cap Agent Guizar purchased at the premises was not an authentic New Era product. It did not contain certain labeling and manufacturing characteristics and features of an authentic New Era produced San Francisco 49ers cap. He testified the manufacturer's suggested retailed price for an authentic 49ers cap would be approximately $34.99. Counterfeit use of their brand on inferior products tarnishes their reputation and brand value.

(Findings of Fact, ¶¶ 6-8.) Based on these findings, the ALJ reached the following conclusion of law:

> The evidence established that Respondent's clerk knew the San Francisco 49ers baseball style cap/hat that bore the New Era logo that he sold to Agent Guizar was not an authentic product. Respondent's clerk so admitted to Agent Guizar as she specifically questioned him about its very authenticity prior to buying the hat.

> The clerk also expressed his belief that an authentic product would be $40.00-$50.00 and yet this cap was selling for only $7.99. The Department provided a knowledgeable witness from the New Era Company who thoroughly explained exactly why the baseball cap Agent Guizar bought was, in fact, not an authentic product of the New Era Company, and that its logo was wrongly counterfeited on the hat.

(Conclusions of Law, ¶ 18.)

If, as the factual findings indicate, appellant's employee had knowledge that the 49ers hat he sold to Agent Guizar was counterfeit, then the violation was knowingly committed.[2]

The employee in question, Sanjiv Bhatta, testified at the hearing. He stated he was unfamiliar with the New Era brand. (RT at p. 114.) Moreover, he gave a different account of his conversation with Agent Guizar:

> MR. NIKFARJAM: Q. And do you remember having the conversation with that lady who testified earlier about that—you telling her that those are counterfeit hats?
>
> [MR. BHATTA]: No.
>
> Q And you don't know that it is a registered trademark?
>
> A Yeah. When she asking me a lot of questions, which she did, and I honestly said that this hat, I don't know about if it's—I think she used something auth something or authen something.
>
> Q Okay.
>
> A Authentic, yeah. And I said, "I don't know about that, but this might not be as good as that you will buy very expensive, but I don’t know about that or like authentic or something."
>
> THE JUDGE: Okay.
>
> THE WITNESS: So I said that it could be low quality because I don't know anything about that, their logo and stuff. I told her that it could be low quality, but I don't know it's a real or a fake one.

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2. Indeed, the ALJ found that "Respondent was not aware of the counterfeit New Era trademark on the hats until he read the Department's accusation." (Findings of Fact, ¶ 17.) Thus, the only way the Department can establish a knowing violation is by showing the employee responsible for the sale knew the hat was counterfeit.

(RT at pp. 114-115.) Bhatta's testimony conflicts with Agent Guizar's recollection of the conversation. Guizar testified:

> MR. KLEIN: Q. So what did you do once you saw the hats in the store?
>
> A I spoke with an employee there at the time and asked if—I was looking for a hat for my brother for a birthday gift. I asked him to provide me the San Francisco 49ers hat. He handed it to me. I asked him if it was fake. He indicated to me that it was—it was fake and that it wasn't authentic, that it would—if it was, it would have cost between 40 to 50 dollars.
>
> Q And—
>
> A I—
>
> Q —what was he charging for the hat?
>
> A $7.99.
>
> Q And did he say anything to you about—anything further beyond the price as to the authenticity of the hat?
>
> A He direct—I asked him if my brother would notice if the hat was fake. He then pointed directly—pointed to the New Era logo and indicated that yes, because based on the logo, it is not authentic. It's really—and that it was fake.

(RT at pp. 28-29.)

Although two witnesses presented conflicting testimony on a material issue—namely, whether Bhatta knew the hat was counterfeit—the decision lacks any explicit credibility finding to indicate why the ALJ favored Agent Guizar's testimony. While it was within the ALJ's discretion to favor Guizar's testimony, the Administrative Procedure Act provides, "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination . . . ." (Gov. Code, § 11425.50(b).)

The statute, however, is silent as to the consequences that flow from an ALJ's failure to articulate the factors mentioned. (See Gov. Code, § 11425.50.) In past cases, this Board has held that the omission of an explicit credibility finding does not merit reversal. (See, e.g.,

Chuenmeesri (2002) AB-7856, at pp. 2-4; *7-Eleven, Inc./Huh* (2001) AB-7680, at pp. 3-5.) As we noted in one such case, "While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed." (*7-Eleven, Inc/Huh*, *supra*, at p. 5.)

In light of our past decisions, and given that this Board is bound by the inferences reached by the ALJ, we affirm count 5. In the future, however, we encourage ALJs to make their credibility findings clear.

II

Appellant contends that he never intended for the video slot machine to be operated as a slot machine; that nothing of value, cash or otherwise, ever dispensed from the machine; and that there was a prominent sign stating "For Amusement Only No Cash Value" on the machine at all times. (App.Br., at p. 1.) Moreover, by October 2, 2015, the machine had been unplugged for lack of interest. (*Ibid.*) Appellant is essentially arguing that the machine was not a slot machine within the meaning of the statutes.

The Department does not respond to this argument. (See generally Dept.Br.)

As noted in Part I, *supra*, this Board is bound by the factual findings and inferences reached in the decision below and may not reweigh the evidence. As with count 5, the grounds for suspension for counts 12 and 16 derive from the Department's police powers as provided by the California Constitution, article XX, section 22, and Business and Professions Code § 24200(a) and (b). The same standards apply here.

Grounds for suspension under counts 12 and 16 of the Accusation emerged from the purported violation of sections 330a, 330.1, and 330.4 of the Penal Code. Section 330a provides, in relevant part:

> (a) Every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, inclosure [*sic*], or building owned, leased, or occupied by him or her, or under his or her management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, redeemable in or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from the machine, when the result of action or operation of the machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, and every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, inclosure [*sic*], or building owned, leased, or occupied by him or her, or under his or her management or control, any card dice, or any dice having more than six faces or bases each, upon the result of action of which any money or other valuable thing is staked or hazarded, or as a result of the operation of which any merchandise, money, representative or article of value, check or token, redeemable in or exchangeable for money or any other thing of value, is won or lost or taken, when the result of action or operation of the dice is dependent upon hazard or chance, is guilty of a misdemeanor.

(Pen. Code, § 330a.)

The courts have observed that section 330a does not prohibit machines that reward the user only with additional play credits:

> Does the amusement afforded by a free game, or games, awarded the player for a high score amount to "merchandise, money, representative or articles of value, checks, or tokens, redeemable in, or exchangeable for money or any other thing of value"? The existence of at least one of these factors is made necessary by the statute in order to classify the machine a gambling device.
>
> Certainly the amusement of a free game is neither merchandise nor money nor checks nor tokens redeemable in or exchangeable for any other thing of value. Merchandise and money are tangible articles that do not include the intangible amusement of a free game. Their definitions are too clear and well known to require argument supporting this conclusion.

(*Gayer v. Whelan* (1943) 59 Cal.App.2d 255, 260 [138 P.2d 763]; see also *Tanner v. Sherman* (1945) 67 Cal.App.2d 586, 586 [affirming trial court judgment that machine paying out in "free

games" was not gambling device under section 330a]; *Merandette v. City & County of San Francisco* (1979) 88 Cal.App.3d 105, 180, fn. 1 [151 Cal.Rptr. 580] [holding that Penal Code statutory scheme, taken as a whole, was not unconstitutionally vague and clearly outlawed gambling machines paying out free plays, but observing in dicta that section 330a taken in isolation "does not prohibit possession of a slot machine that rewards a winner only with additional games"].)

The courts have also held—with somewhat less clarity—that section 330a does not apply to inoperative machines:

> The purpose of the law is to prohibit games of the kind mentioned and described at which money or property, or the representative thereof, is lost or won. It cannot be assumed that it is impossible that any of the games specifically mentioned may not be played for amusement only and without the incident of money or property being wagered or bet thereat. . . . [I]t is apparent that to sustain a conviction of violating section 330a, it is necessary to charge and to prove that the person accused was in possession or control of a machine or device which not only could be *but actually was* operated as a gaming device in the manner described in the statute.

(*Chapman v. Aggeler* (1941) 47 Cal.App.2d 848, 854 [119 P.2d 204], emphasis added, citing and rejecting *People v. Kay* (1940) 38 Cal.App.2d Supp. 759, 761 [102 P.2d 1110] [violation of section 330a proven where machines were inoperative but could not "be used, or played, for any purpose except to gamble"].) At least one court, however, has questioned this line of reasoning, observing that

> section 330b et seq. were enacted to prohibit the mere possession of certain machines after the court in *Chapman v. Aggeler* . . . construed section 330a to prohibit the possession of a machine actually being used as a gaming device, but not the mere possession of a machine which could be so used.

(*Merandette*, *supra*, at p. 113.) That case, however, merely noted that *subsequent provisions* were added to outlaw the mere possession of such machines, regardless of their operation.[3] It did not challenge previous courts' holdings that section 330a, taken alone, permits possession so long as the machines are not actually used for gambling.

Section 330.1, subdivision (a), provides:

> (a) Every person who manufactures, owns, stores, keeps, possesses, sells, rents, leases, lets on shares, lends or gives away, transports, or exposes for sale or lease, or offers to sell, rent, lease, let on shares, lend or give away or who permits the operation of or permits to be placed, maintained, used, or kept in any room, space, or building owned, leased, or occupied by him or her or under his or her management or control, any slot machine or device as hereinafter defined, and every person who makes or permits to be made with any person any agreement with reference to any slot machine or device as hereinafter defined, pursuant to which agreement the user thereof, as a result of any element of hazard or chance, may become entitled to receive anything of value or additional chance or right to use that slot machine or device, or to receive any check, slug, token, or memorandum, whether of value or otherwise, entitling the holder to receive anything of value, is guilty of a misdemeanor.

(Pen. Code, § 330.1(a).) Subdivision (f) extends the provision to machines that reward the user only with additional play credits:

> (f) A slot machine or device within the meaning of Sections 330.1 to 330.5, inclusive, of this code is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value or any check, slug, token, or memorandum, whether of value or otherwise, which may be given in trade, *or the user may secure additional chances or rights to use such machine or device*, irrespective of whether it may, apart from any element of hazard or chance, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

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3. Section 330b, for instance, outlaws any machine that "is adapted, or may readily be converted, for use in" gambling, or that pays out in "additional chance or right to use the slot machine or device." (Pen. Code, § 330b.) It is curious that the Department chose to rely on the less inclusive language of section 330a.

(Pen. Code, § 330.1(f), emphasis added). Under section 330.1, the metric is not whether the machine awards an item of actual value, but rather whether the reward is earned "by reason of any element of hazard or chance." (Pen. Code, § 330.1(f).)

Finally, section 330.4 clarifies that the mere possession on the premises of the slot machine, as defined in section 330.1, is prohibited:

> It is specifically declared that *the mere possession or control*, either as owner, lessee, agent, employee, mortgagor, or otherwise of any slot machine or device, as defined in Section 330.1 of this code, is prohibited and penalized by the provisions of Sections 330.1 to 330.5, inclusive, of this code.
>
> It is specifically declared that every person who permits to be placed, maintained or kept in any room, space, enclosure, or building owned, leased or occupied by him, or under his management or control, *whether for use or operation or for storage, bailment, safekeeping or deposit only*, any slot machine or device, as defined in Section 330.1 of this code, is guilty of a misdemeanor and punishable as provided in Section 330.1 of this code.

(Pen. Code, § 330.4, emphasis added.) The fact that a machine is nonoperational, or even stored out of the view of patrons, is no defense. (*Ibid.*)

The ALJ made the following relevant findings of fact:

> 12. On September 10, 2015, Agent Sumida . . . observed a slot machine in a public area on the premises near the entrance. It had a pay-out screen indicating a schedule of what certain spin results would earn in terms of "credits". It had a paper sign posted on it stating "For Amusement Only No Cash Value". (Exhibit 2) In Agent Sumida's experience, few of these type slot machines found in licensed premises actually pay out in cash. Some will pay out a redeemable voucher. Some machines permit added free spins or plays for a winning combination until there are at least 20 or so credits, after which a cash out or redemption may be possible. Sumida played the machine, but never hit a winning combination.
>
> 13. On September 24, 2015, ABC Agent Justin Griffin went to Respondent's premises and observed the video slot machine within Respondent's store in a public area near an entrance. He deposited $2.00 into the machine and was given 8 play credits. One of the machine's buttons was pressed to select the amount of the wager, and one was to begin the spinning of electronic panels. Agent Griffin played the machine, but did not win any of his wagers. No skill or experience was needed to play the machine. This machine paid out winning bets in added plays on the machine. The machine did not make cash payouts, or issue any kind of voucher or script redeemable for money or other goods.

> 14. On or about October 2, 2015, some hats/caps were seized by law enforcement from Respondent's premises . . . . Respondent confirmed the slot machine was on the premises that date, but was unplugged as he was going to return it to the original vendor.
>
> [¶ . . . ¶]
>
> 16. The slot machine was provided by another local vendor and was at the store for less than two months. It paid out only winning credits entitling the user to added plays on the machine. Respondent posted a sign on the machine saying "For Amusement Only, No Cash Value.["] (Exhibit 2) Respondent did not pay out any cash winnings or redeem or exchange any credits won on the machine for cash or merchandise.

(Findings of Fact, ¶¶ 12-14, 16.) Based on these findings, the ALJ reached the following conclusions of law[4]:

> 12. Cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) with respect to Count 12 and 16 alleging a violation of California Penal Code sections 330a, 330.1, and 330.4 on September 24, 2015 and October 2, 2015.
>
> [¶ . . . ¶]
>
> 16. As to Count 12 and 16, the evidence established Respondent intentionally placed and maintained a slot machine in a public area of his licensed premises with the intent that customers would play the machine. Respondent had an agreement with the machine's owner to split the money deposited in the machine by its players. The machine was a game of chance or hazard, not of skill. After inserting money and pushing one of the slot machine's buttons, a random combination of symbols appeared. If it was a winning combination, an added credit(s) was awarded. That credit entitled the user to additional plays on the machine. That was a thing of value. Winning credits were neither paid out in cash nor otherwise redeemable in cash or goods.

(Conclusions of Law, ¶¶ 12, 16.)

It is indisputable that the machine at issue here is prohibited under Penal Code sections 330.1 and 330.4. Section 330.1 prohibits machines that pay out "anything of value *or an*

4. Conclusions of Law paragraphs 13 through 15 merely recite the language of Penal Code sections 330a, 330.1, and 300.4.

additional chance or right to use that slot machine or device," which includes the machine at appellant's premises. Moreover, section 330.4 prohibits the mere possession of such a machine, whether operative or not. The fact that the machine was unplugged on October 2, 2015—the date of the events underlying count 16—does not provide a defense.

We question the applicability of section 330a, however, which was cited as partial grounds for both count 12 and count 16. As noted above, case law does not include "free plays" as the sort of payout contemplated in section 330a. While the Proposed Decision includes the conclusory statement that "additional plays" were "a thing of value," (Conclusions of Law, ¶ 16), it supplies no legal support for that interpretation.[5] Moreover, case law suggests that an inoperative machine does not fall under section 330a. The ALJ found the machine paid out in free plays (Findings of Fact, ¶¶ 13, 16) and was unplugged on October 2 (Findings of Fact, ¶ 14). Either factor would exclude it from the language of section 330a. The Department has therefore failed to prove a violation of Penal Code section 330a.

Of course, counts 12 and 16 were not brought under section 330a alone, but under sections 330a, 330.1, and 330.4 in conjunction. For each count, the Department has proven violations of section 330.1 and 330.4, but not 330a.

The failure to establish violations of section 330a is not fatal, however. There is no doubt that appellant possessed on his licensed premises a gambling machine prohibited by sections 330.1 and 330.4 of the Penal Code, and that grounds for suspension therefore exist under the California Constitution and sections 24200(a) and (b) of the Business and Professions Code. Indeed, the Department could have omitted mention of section 330a from

5. In its brief, the Department ignores the slot machine issue entirely.

counts 12 and 16 and simply found appellant in violation of sections 330.1 and 330.4, with the same resulting penalty. We therefore affirm counts 12 and 16.

III

Appellant requests a more lenient penalty and suggests a fine in lieu of suspension. (App.Br., at p. 1.) Appellant points out that no disciplinary action has been taken against his license since 2004. (*Ibid.*) Moreover, when he was finally ticketed and charged, there was no counterfeit merchandise on the premises and the gaming machine was unplugged. (*Ibid.*)

The Department counters that the penalty was within its discretion, and was in fact reduced. (Dept.Br., at pp. 3-4.)

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, it will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.App. 2d 589, 594 [43 Cal.Rptr. 633].)

The ALJ assigned a penalty of 15 days' suspension for count 5, involving the counterfeit 49ers hat. He assigned a penalty of 20 days' suspension—with 15 days conditionally stayed provided no cause for disciplinary action arise in the subsequent two years—for counts 12 and 16, involving the video slot machine. He further held that the penalties should run concurrently. In light of the stayed penalty and concurrence, the result is that appellant will be unable to sell alcoholic beverages for 15 days.

The ALJ outlined the reasoning behind his assigned penalties in unusual detail:

> 1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as Rule 144. However, the rule also permits imposition of a different penalty based on the presence of aggravating or mitigating factors.
>
> 2. Under Rule 144, the presumptive penalty for possession of a slot machine where there were payoffs is a 30 day suspension, with 15 of those 30 days stayed for two years. In this case, winnings at the lone slot machine were limited to added plays on it. There was no evidence of any cash payouts or cash redemptions. Though Respondent posted a sign on the slot machine indicating it was for amusement only and "no cash value", it was still an illegal slot machine.
>
> 3. As to count 5, Rule 144 does not include a recommended penalty regarding the selling of merchandise bearing counterfeit marks. The Department recommended a penalty of revocation, stayed for 2 years, and a 20 day suspension if the accusation were sustained. However, as only Count 4 was sustained as to the selling and possession for sale of a mis-branded San Francisco 49ers cap, a lesser penalty is warranted.
>
> 4. Rule 144 also notes that the length of licensure at the premises without discipline or problems is a factor in mitigation. Though the accusation did allege one prior 2004 disciplinary action against Respondent filed under Reg: 04056844, no evidence was presented to establish that fact. As such, it is deemed as though the Respondent has been licensed since 1991 with no prior disciplinary action, and therefore some mitigation is warranted.
>
> 5. After weighing and considering those factors in aggravation and mitigation, the measure of discipline ordered below complies with Rule 144.

(Penalty, ¶¶ 1-5.)

We find no fault in this reasoning. The assigned penalties are within the guidelines provided by Rule 144. Moreover, the ALJ took into account mitigating evidence and reduced the penalties for all three counts. Indeed, he granted mitigation for a discipline-free history going back to 1991, where appellant in his brief only argues discipline-free operation since 2004. The assigned penalties do not constitute an abuse of discretion; they are, in fact, quite fair.

ORDER

The decision of the Department is affirmed.[6]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

DISSENTING OPINION

I agree with the majority's decision to sustain all counts. With regards to counts 12 and 16, however, I find the Department's penalty excessive in light of the law and the facts, and therefore dissent from the majority's decision to affirm the penalty imposed.

It is not clear that Penal Code section 330a, which formed part of the grounds for both counts, applies to the facts of this case. In particular, I hold to the reservation, voiced in the majority opinion, that there was *something of value* offered in the form of added chances to play an antiquated video slot machine found at the appellant's place of business, in spite of the sign taped across it stating "For Amusement Only No Cash Value." (See Part II, *supra*.) The connection is so tenuous as to be inapplicable.

As cited by the majority, there's more than one interpretation of what Penal Code section 330a is intended to cover:

• In *Gayer* and *Tanner*, the court said in effect that a machine paying out free games was *not* a gambling device. (See *Gayer*, *supra*, at p. 260; *Tanner*, *supra*, at p. 586.)

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6. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

• In *Merandette*, a later court deemed section 330a *does* prohibit machines paying out free plays, yet held that that section does not prohibit mere *possession* of a slot machine that rewards a winner only with additional games. (See *Merandette*, *supra*, at p. 113.)

Apparently, it is later additions to the statutory scheme—Penal Code sections 330.1, and more especially, 330.1(a)—that make the mere possession of a game-of-chance machine that rewards only with more plays, even in a basement and inaccessible to customers, a misdemeanor. (See *Merandette*, *supra*, at p. 113; see also Part II, *supra*.) It is not clear, however, that the addition of these independent statutes changes the fundamental meaning of Penal Code section 330a. It does appear that whatever the language of later statutes, section 330a is still inapplicable to the facts of this case. In my opinion, the Department's failure to prove a violation of one of the three statutes underlying counts 12 and 16 ought to have resulted in a lesser penalty for the licensee.

I further realize that a shopkeeper must abide by whatever laws are in vigor at the time he applies for a license, and thereafter, as long as he continues to exercise the privileges of that license. Yet that shopkeeper might be forgiven for not following shifting definitions in law that turn 180 degrees on a single word over several decades. While ignorance of the law is, of course, no excuse, it seems even this state's own courts cannot concretely agree on section 330a's meaning.

Finally, I must say, as a layman confronting the language and the interpretation of this law, that it comes across as disproportionate to whatever public good it pretends to preserve; the later and more restrictive interpretations of these provisions of the Penal Code seem more consonant with the Massachusetts Bay Colony of 1650 than with California in 2017. While I do not presume to defy the legislature on the point, I question whether the state is truly defending

the health and safety of its citizens by outlawing the mere *possession* of an inoperative video gaming machine that pays in nothing but additional plays.

I understand that the final judgment imposing a 20-day suspension of the appellant's license to sell alcoholic beverages was ordered to be run concurrently with an independent judgment of 15 days' suspension, predicated on different (and in my opinion more substantive) grounds. I nevertheless disagree with the majority insofar as it upholds the 20-day suspension under counts 12 and 16. For the reasons stated, I would advocate a reduction in the penalty for counts 12 and 16—ideally to 15 days, to run concurrent with the 15 days already imposed on the other count—and would remand this case to the Department for reconsideration of the penalty imposed.

JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD